

INDEX

	PAGE
Jurisdictional Facts	2
Opinions	2
Proceedings	2
Question presented	3
Statement	4
Reasons Relied on for Allowance of Writ.....	8
Conclusion	10

CITATIONS

	PAGE
Delaware, The, 161 U. S. 459, 469.....	9
STATUTES:	
28 U. S. Code §347(a).....	2
33 U. S. Code §§204, 206-7.....	6
33 U. S. Code §§204, 207, 208.....	8
33 U. S. Code §213.....	6
MISCELLANEOUS:	
Supervising Inspectors' Rules II, VII.....	3, 5, 6
APPENDIX:	
Inland Rules of Navigation Articles 19, 21, 22, 23, 27	11
Supervising Inspectors' Rules II, III, VII.....	12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1939

Nos. 73 AND 74

SOUTHERN PACIFIC COMPANY
Petitioner

VS.

Steamship *Eastern Glade*, etc.,
POSTAL STEAMSHIP CORPORATION
Claimant

SOUTHERN PACIFIC COMPANY
Petitioner

VS.

POSTAL STEAMSHIP CORPORATION
Respondent

**PETITION OF SOUTHERN PACIFIC COMPANY FOR
WRITS OF CERTIORARI**

Petitioner, Southern Pacific Company, prays for writs of certiorari to be issued to review a decision of the Circuit Court of Appeals for the Second Circuit in admiralty, reversing on reargument its previous decision affirming two decrees of the District Court for the Southern District of New York in favor of petitioner.

Jurisdiction

Jurisdiction is based on Section 240-a of the Judicial Code as amended (28 U. S. C., Sec. 347 (a)).

Opinions below

The opinion of the Circuit Court of Appeals on reargument, (R. 292-4), is reported at 112 F. (2d) 297. A petition for rehearing was denied without opinion. The previous opinion of the Circuit Court of Appeals is reported at 101 F. (2d) 4 (R. 281-4), and that of the District Court at 20 F. Supp. 373 (R. 265-70). The orders for mandate were entered in the office of the Clerk of the Circuit Court of Appeals on June 20, 1940 (R. 300-1); the granting of a previous petition for certiorari to this Court is reported at 308 U. S. 532 (R. 287), and the decision of this Court is reported at 308 U. S. 378 (R. 303-11).

Proceedings below

These cases involve a collision between petitioner's steamship *El Isleo* and respondent's steamship *Eastern Glade* in Baltimore Harbor. The District Court and the Circuit Court of Appeals both held the *Eastern Glade* solely at fault for failure to comply with the provisions of Articles 19, 21-23 of the Inland Rules of Navigation (33 U. S. C. 204, 206-8), which required her, as the giving-way vessel in a crossing situation, to keep out of *El Isleo's* way, avoid crossing ahead of *El Isleo* and to slacken her speed or stop and reverse. The same rules required *El Isleo*, as the holding-on vessel, to keep her course and speed.

The owner of the *Eastern Glade*, Postal Steamship Corporation, thereupon petitioned this Court for writs of certiorari, admitting that the *Eastern Glade* was at fault and contending that *El Isleo* was also at fault for failing to comply with Inspectors' Rules II and VII. Certiorari was granted, and the question before this Court was the validity of the Inspectors' Rules II and VII. This Court held that the Inspectors' Rules were valid and remanded the case to the Circuit Court of Appeals for further action, freed from the supposed compulsion to follow previous decisions treating the rules as invalid.

On reargument, the Circuit Court of Appeals held both vessels at fault, basing its decision upon its understanding that this Court had held that the Inspectors' Rules required the holding-on vessel in this situation to stop her engines before making a passing agreement and further that the vessels may not undertake to agree "while they remain under way".

A petition for rehearing, duly filed in the Circuit Court of Appeals, was denied on June 20, 1940.

Question presented

Do the Navigation Rules or the Supervising Inspectors' Rules unconditionally forbid any agreement between vessels in a crossing situation, other than assent to the original proposal, while the vessels remain under way?

Statement

The facts as originally stated by the Circuit Court of Appeals, and as adopted by this Court are as follows:

“The collision occurred in the waters of Baltimore Harbor near the junction of Curtis Bay Channel with Fort McHenry Channel. The latter is about 600 feet wide and runs in a northwesterly direction towards Baltimore; the former, running nearly east and west, comes into Fort McHenry Channel from the west but does not cross it. The night was clear, the tide ebb, and a 15 mile breeze was blowing from the northwest. The steamship *Eastern Glade*, light, was bound out of Curtis Bay Channel and was intending to turn left into Fort McHenry Channel and proceed to Baltimore. The steamer *El Isleo*, laden with 1,000 tons of steel ore, also bound for Baltimore, was proceeding up Fort McHenry Channel at full speed—about eight miles through the water, as she was working only one boiler. When the vessels sighted each other they were more than a mile apart, the *El Isleo* being about four points on the starboard bow of the *Eastern Glade*. The latter stopped her engines and shortly thereafter sounded a two blast signal to indicate, as her master says, that his course was to the left and up Fort McHenry Channel. *El Isleo* answered the two blast signal with an alarm followed by one blast to indicate that she would keep her course and speed. Captain Korn of *El Isleo* testified that the *Eastern Glade* responded with four blasts followed by one, while her captain says she responded with three blasts to indicate that she was reversing her engines. *El Isleo* kept on until she reached a buoy just opposite Curtis Bay Channel, when believing collision imminent, she put her rudder hard right and swung out of Fort McHenry Channel to her starboard. The *Eastern Glade*, although her master testified that he intended to hold back in Curtis Bay Channel until *El Isleo* had passed the junction, came clear across Fort



McHenry Channel and brought her stem into contact with the port side of *El Isleo* about amidships. The place of collision was east of Fort McHenry Channel (R. 282)."

According to *El Isleo's* master, the *Eastern Glade* answered *El Isleo's* signal by an alarm and a single blast, which meant an agreement with *El Isleo* that she might continue her course; in other words, a withdrawal of the *Eastern Glade's* proposal to cross *El Isleo's* bow. According to the *Eastern Glade's* master, he blew a backing signal (three blasts), which amounts to the same thing, i. e., a withdrawal of his first proposal to cross *El Isleo's* bow and an agreement that *El Isleo* continue her course. This is what the *Eastern Glade's* master actually intended to do. Indeed, her master testified that he had no intention of doing anything but holding back and letting *El Isleo* go right on up the channel, and that the collision was due to a "miscalculation" on his part (R. 168). There was, therefore, in fact no misunderstanding as to the intention of the navigators.

Notwithstanding this undisputed fact *El Isleo* has been held at fault by the Circuit Court of Appeals in its most recent decision because she did not stop prior to the exchange of signals. In reaching this conclusion the Circuit Court of Appeals assumed that this Court interpreted Rule VII as follows:

"There can be no doubt that the Supreme Court meant to hold that in a crossing case, when the holding on vessel gets two blasts from the giving way vessel, which are unacceptable to her, she must neither cross the signal, nor keep her speed, but must at least stop her engines, and if necessary back, 'until signals for passing in safety are made and understood' [Rule VII]" (R. 295).

The opinion of this Court (which is confined to upholding the validity of the rules)* does not support the above conclusion. As to Inspectors' Rule VII, it reads:

"Moreover, the Inspectors expressly recognize and follow the statute in providing in Rule VII, first paragraph, that 'the steam vessel which has the other on her own port side shall hold her course and speed'; and 'the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse'. The second paragraph of Rule VII, providing for the stoppage and backing of both vessels if necessary 'until signals for passing with safety are made and understood', was clearly intended to apply to the dangerous situation envisaged in Article 27 of the statute" (R. 295).

In brief the first paragraph of Rule VII merely implements Articles 19, 21 and 22 of the Inland Rules of Navigation (33 U. S. Code, Sections 204, 206, 207) and the second paragraph makes applicable to this situation Article 27 of the Inland Rules, known as the "general prudential rule" (33 U. S. Code, Section 213).

It may be that the Circuit Court of Appeals misunderstood an earlier paragraph in this Court's opinion, where this Court quoted the contention of counsel for the *Eastern Glade*, as follows:

"Hence, it is argued that *El Isleo* was required to 'stop, and reverse if necessary,' when the *Eastern Glade* sounded her two blast signal, * * * " (R. 307).

This was argument of counsel, and its vice is in the added punctuation, which is not contained in the rule, viz.,

* This Court said:

"We deal simply with the question presented with respect to the validity of the Inspectors' Rules here in question" (R. 311).

the comma after the word "stop". The error was carried on later in the opinion of the Circuit Court of Appeals as follows:

"Rule VII is explicit; it forbids any agreement other than an assent to the proposal, until after the vessels have at least stopped their engines" (R. 294).

On the contrary, the rule provides only that the vessels shall be "stopped and backed *if necessary*".* There was in fact no necessity for stopping and backing in the instant case. As the Court found, the vessels were over a mile apart, whereas the Supervising Inspectors' Rule III provides that the signals for passing shall be given "at a distance within half a mile of each other". The vessels thereupon agreed upon the course to be followed by each at a time when they were far enough apart for safe passing, and the collision would not have occurred if the *Eastern Glade* had done what she said she was going to do and what her master testified he intended to do, as pointed out in *El Isleo's* brief on the original petition for certiorari (pp. 6-10), wherein is set forth the admission of the *Eastern Glade's* master that he intended *El Isleo* to keep on, and it was only due to miscalculation on his (*Eastern Glade's*) part that the collision occurred.

The most recent opinion of the Circuit Court of Appeals goes even further and holds that the vessels may not agree by whistle signals while they are *under way*. The opinion reads:

"They (vessels) may not undertake to agree while they remain under way" (R. 294).

* This undoubtedly was the intention of the Supervising Inspectors, for such an interpretation would not bring the second paragraph of Rule VII in conflict with the first paragraph of Article 23 of the Inland Rules of Navigation.

There is nothing in the rules of the Supervising Inspectors or in the Navigation Rules or in the decision of this Court or any other decision to support this conclusion. From the very nature of things, vessels must exchange passing signals and "undertake to agree while they remain under way".

The practical situation is worthy of consideration. These rules cover inland waters, including the congested conditions of New York Harbor and the Hudson and East Rivers. Let us assume several vessels, one astern of the other, proceeding up or down either of these rivers, all privileged (holding on) with reference to a crossing vessel which sounds a two-blast signal. To require the first privileged (holding on) vessel to stop "willy-nilly" because the burdened (giving way) vessel sounds a two-blast signal would result in her stopping in the path of other vessels proceeding up and down and across the river and thus bring about collisions instead of preventing them.

We are in sympathy with any interpretation of the rules which will minimize the danger of collision, but we submit that requiring vessels to stop when it is not necessary and indeed inadvisable will not bring about this result.

Reasons Relied on for Allowance of Writ

1. The latest decision of the Circuit Court of Appeals has interpreted erroneously the decision of this Court.
2. The Circuit Court of Appeals' interpretation of the Rules creates a modification of Statutory Article 23 in

holding that the holding on vessel in a crossing situation must hold her course and speed, viz., the decision imposes upon the holding on vessel an unqualified obligation to stop upon receiving from the burdened vessel a proposal which is unacceptable, notwithstanding Inspectors' Rule VII requires her to stop only "*if necessary*".

3. The decision denies to moving vessels (without any supportable language in the Inspectors' Rules or the Navigation Laws) the right which has been theirs from time immemorial to agree to a passing by exchange of whistle signals while "under way".

4. The Circuit Court of Appeals' interpretation of this Court's opinion that "they (vessels) may not undertake to agree while they remain under way" sets up a new rule of navigation impossible to follow. In the very nature of things, vessels must exchange passing signals while "under way" and it would be impossible in harbor navigation to refrain from exchanging signals until the vessels had lost their way.

5. The decision makes an exception to Article 23 of the statutory rules of navigation, which this Court has held would

"produce timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent * * * ." *The Delaware*, 161 U. S. 459, 469.

CONCLUSION

It is respectfully submitted that this controversy presents an important question of interpretation of the Rules of an administrative body made pursuant to Federal Statute, a serious conflict between the Rules as interpreted and a Federal Statute for the prevention of collisions, and is of such general concern as to merit a review by this Honorable Court.

CHAUNCEY I. CLARK

BURTON H. WHITE

Counsel for Petitioner

Southern Pacific Company

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to favorable consideration of the Court, and that it is not filed for the purpose of delay.

CHAUNCEY I. CLARK

New York, August 16, 1940



APPENDIX

Inland Rules of Navigation

Article 19. Crossing situation. Burdened vessel to keep out of the way when two steam vessels are crossing.

When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other (June 7, 1897, sec. 1-33 U. S. C. 204) (Navigation Laws of the United States, 1935, p. 255).

Article 21. Crossing situation. Privileged vessel to keep her course and speed.

Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed. (June 7, 1897, sec. 1-33 U. S. C. 206). [See arts. 27 and 29.] (Navigation Laws of the United States, 1935, p. 255).

Article 22. Burdened vessel avoid crossing ahead.

Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. (June 7, 1897, sec. 1-33 U. S. C. 207). (Navigation Laws of the United States, 1935, p. 255).

Article 23. Burdened vessel to slacken speed, stop or reverse.

Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed, or stop or reverse. (June 7, 1897, sec. 1-33 U. S. C. 208). (Navigation Laws of the United States, 1935, p. 255).

Article 27. General prudential rule.

In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (June 7, 1897, sec. 1-33 U. S. C. 212). (Navigation Laws of the United States, 1935, p. 256).

Supervising Inspectors' Rules

RULE II. Steam vessels are forbidden to use what has become technically known among pilots as "CROSS SIGNALS", that is, answering one whistle with two, and answering two whistles with one.

RULE III. The *signals for passing*, by the blowing of the whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting "head and head", or nearly so, but at all times when the steam vessels are in sight of each other, when passing or meeting at a distance within half a mile of each other, and whether passing to the starboard or port.

The whistle signals provided in the rules for steam vessels meeting, passing, or overtaking are never to be used except when steam vessels are in sight of each other, and the course and position of each can be determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights. In fog, mists, falling snow, or heavy rain-storms, when vessels can not so see each other, fog signals only must be given.

RULE VII. When two steam vessels are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steam vessel is overtaking another, the steam vessel which has the other on her own port side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse.

If from any cause the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steam vessels shall be stopped and backed if necessary, until signals for passing with safety are made and understood.

FILED

AUG 26 1940

CHARLES ELBOM DROFLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1939

No. [REDACTED]

375-376

SOUTHERN PACIFIC COMPANY,

Petitioner,

vs.

Steamship EASTERN GLADE, etc.,
POSTAL STEAMSHIP CORPORATION,

Claimant.

SOUTHERN PACIFIC COMPANY,

Petitioner,

vs.

POSTAL STEAMSHIP CORPORATION,

Respondent.

APPLICATION FOR ORDER

CHAUNCEY L. CLARK

BURTON H. WHITE

Counsel for Petitioner

BURLINGHAM, VEEDER, CLARK & HUPPER

27 William Street

New York City

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1939
Nos. 73 AND 74

SOUTHERN PACIFIC COMPANY
Petitioner

vs.

Steamship *Eastern Glade*, etc.,
POSTAL STEAMSHIP CORPORATION
Claimant

SOUTHERN PACIFIC COMPANY
Petitioner

vs.

POSTAL STEAMSHIP CORPORATION
Respondent

Your petitioner, Southern Pacific Company, respectfully presents this its application for an order granting it leave to use the certified transcript and copies of the printed record in the cases of the Postal Steamship Corporation against Steamship *El Isleo et al.*, and of the Postal Steamship Corporation against Southern Pacific Company, which were No. 73 and No. 74 on the calendar of this Court for the October Term, 1939, in connection with a petition for a writ of certiorari which is to be filed herewith, provided the said transcript and copies of the printed record are supplemented by the printing and insertion of all the proceedings had in these cases since the entry of the judgment of this Court on January 2, 1940.

Petitioner, in support of its motion, presents the following:

Summary Statement of Matters Involved in the Cases

These cases arise out of a collision in Baltimore harbor between petitioner's steamship *El Isleo* and respondent's steamship *Eastern Glade*.

The United States District Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit held the *Eastern Glade* solely at fault for her failure to comply with Articles 19, 21, 22 and 23 of the Inland Rules of Navigation (33 U. S. C. 204, 206, 207 and 208) applying to vessels on crossing courses.

The owners of the *Eastern Glade* applied to this Court for certiorari, claiming that the *El Isleo* was at fault for failure to comply with Rules II and VII of the Rules of the Supervising Inspectors. The Inspectors' rules had, in a number of decisions, been held invalid when applied to vessels in crossing situations. This Court granted certiorari and rendered a decision holding only that the Inspectors' rules were valid but remanded the cases to the Circuit Court of Appeals for further action free from the supposed compulsion to follow the previous decisions treating the rules as invalid (308 U. S. 378). The Circuit Court of Appeals on the reargument, nevertheless, felt that it was bound by the decision of this Court and handed down its decision holding both vessels at fault (112 F. (2d) 297).

A petition for certiorari has been prepared for the purpose of showing this Court that the Circuit Court of Appeals decision resulted from a misinterpretation of the

decision of this Court and of the Inspectors' rules and that the rules, as so interpreted, are in conflict with Federal Statutes for the prevention of maritime collisions.

Reasons for Allowance of the Order

1. The question raised by the recent decision is of such paramount importance as to require the decision of this Court.

2. The cases having been once before this Court, the record is available for the consideration of the petition when supplemented by the printing and insertion of all proceedings since the entry of the judgment of this Court on January 2, 1940. The additional expense of reprinting that portion of the record now available would be wholly unnecessary and serve no useful purpose.

Respectfully submitted,

CHAUNCEY I. CLARK

BURTON H. WHITE

Counsel for Petitioner.

Dated: August 16, 1940.



SEP 18 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

Nos. 73 AND 74

375 - 376

SOUTHERN PACIFIC COMPANY,
Petitioner,

vs.

STEAMSHIP EASTERN GLADE, etc.,
POSTAL STEAMSHIP CORPORATION,
Claimant.

SOUTHERN PACIFIC COMPANY,
Petitioner,

vs.

POSTAL STEAMSHIP CORPORATION,
Respondent.

**MEMORANDUM FOR POSTAL STEAMSHIP
CORPORATION, RESPONDENT.**

If there is ambiguity in the petitioner's statement of the question presented, it is achieved by taking two words from Judge Learned Hand's opinion and understanding them to mean something that their context does not substantiate.

What Judge Learned Hand wrote,—the concluding sentences of the Circuit Court of Appeals' opinion,—was:

“Rule VII is explicit; it forbids any agreement other than an assent to the proposal, until after the

vessels have at least stopped their engines. They may not undertake to agree while they remain under way. That is what *El Isleo* did, because she supposed that it was her duty, as well as her privilege, to keep on. It is quite impossible to say that if she had stopped—her minimal duty—the collision would still have happened; the probabilities are the other way; and although it is true that, as between the two vessels the *Eastern Glade* was far more gravely at fault, we have no power to apportion the damages. Decree reversed; damages divided” (R. 294).

Petitioner seems to suppose that Judge Hand meant to say that the vessels must stop their *headway* before coming to an agreement. There are probably not many persons who would share the petitioner’s supposition after reading the foregoing extract with the knowledge that Judge Learned Hand had written the opinion in *The Fulton* case, on the strength of which this court granted certiorari and reversed the Circuit Court of Appeals’ former decision in this case (R. 303-311). Having heard the instant case twice, surely Judge Hand was familiar with the subject matter when he wrote the present opinion of the Circuit Court of Appeals, on reargument; and at most it would be idle to suggest that Judge Hand needs help with his English.

If there is no ambiguity in the petitioner’s statement of the question presented, nothing new has been offered for this court’s consideration.

As was pointed out when the case was here before (see Petitioner’s Reply Brief, p. 5), the comma after the word “stopped” originally appeared in the Inspectors’ Rules, but was omitted, evidently by inadvertence, from the editions after the one of July 25, 1911. The same language, with the original punctuation, has continued to be used in the Pilot Rules for the Great Lakes, Rule X of which corresponds with Rule VII of the Inland Pilot Rules, and

was quoted in full on pages 14 and 15 of the Petitioner's Brief, submitted by the present respondent when the case was before this court. Comma or no comma, it has always been plain enough that Rules II and VII would be worse than useless if the matter of stopping his engines before sounding cross signals were left optional with the pilot of the vessel first addressed.

Respectfully submitted,

JOHN C. CRAWLEY,
EARLE FARWELL,
for the Respondent.

New York, September 16, 1940.